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No. 86-1764

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1987

BETHESDA HOSPITAL ASSOCIATION AND
THE DEACONESS HOSPITAL OF CINCINNATI, OHIO,
PETITIONERS,

v.

OTIS R. BOWEN, M.D., SECRETARY OF
HEALTH AND HUMAN SERVICES,
RESPONDENT.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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4 pp

SUPPLEMENTAL STATEMENT

At the time the petition for certiorari was filed on May 2, 1987, six courts of appeals had addressed the issue of self-disallowances. Since that date, one additional court of appeals has ruled on the issue, and one of the original six has issued a second decision on the issue. Both cases held in favor of the hospitals and against the Secretary, but used different analyses.

On May 18, 1987 the Ninth Circuit ruled that the Provider Reimbursement Review Board ("Board") has jurisdiction to hear self-disallowed costs. *Adams House Health Care v. Heckler*, 817 F.2d 587 (9th Cir. 1987). The court aligned itself with the Seventh Circuit decision in *St. Mary of Nazareth Hospital Center v. Department of Health and Human Services*, 698 F.2d 1337 (7th Cir.), *cert. denied*, 464 U.S. 830 (1983), noting that the "plain language" of 42 U.S.C. § 1395oo(d) provides that the Board may review matters "not considered by the intermediary." 817 F.2d at 591. The court then analyzed the decision of the D.C. Circuit in *Athens Community Hospital, Inc. v. Heckler*, 743 F.2d 1 (D.C. Cir. 1984) ("Athens II"), *modifying Athens Community Hospital, Inc. v. Schweiker*, 686 F.2d 989 (D.C. Cir. 1982) ("Athens I"), rebutting in detail the five arguments raised in *Athens II* in support of the Secretary's interpretation, many of which were relied on by the Secretary in his Brief for the Respondent in the instant case. 817 F.2d at 591-594.

The Ninth Circuit also rejected the First Circuit's conclusion in *St. Luke's Hospital v. Secretary of Health and Human Services*, 810 F.2d 325 (1st Cir. 1987), that the Board has the discretion to hear or not hear appeals of self-disallowed issues. Instead, it found that the language in § 1395oo(d) (the Board "shall have the power" to affirm, reverse or modify an intermediary's determination) refers only to the Board's options once an appeal is filed, not to the Board's authority to refuse to hear an appeal. 817 F.2d at 594.

On May 5, 1987 the Eleventh Circuit also ruled in favor of the hospitals on the issue of self-disallowance, adopting an analysis not discussed by any of the other courts. In *Tallahassee Memorial Regional Medical Center v. Bowen*,[1] 815 F.2d 1435 (11th Cir. 1987), a case involving a direct challenge to the same Medicare reimbursement regulation challenged by the petitioners here, the court found that the relevant statutory provision governing Board jurisdiction is the third through sixth sentences of § 1395oo(f)(1).[2] 815 F.2d at 1459. These provisions allow hospitals to by-pass a hearing at the Board in instances where the Board cannot grant relief because it is bound by the very regulation the hospitals seek to challenge. Because subsection (f)(1) explicitly incorporates the jurisdictional requirements of subsection (a) but not subsection (d), and because the grant of judicial review in the by-pass provisions of subsection (f)(1) does not require a hearing at the Board, the court found the language in subsection (d) concerning the powers of the Board to be irrelevant. So long as a hospital meets the jurisdictional requirements of subsection (a), it is entitled to judicial review. 815 F.2d at 1461. Significantly, the court distinguished its earlier decision in *North Broward Hospital District v. Bowen*, 808 F.2d 1405 (11th Cir. 1987),[3] on the ground that the hospitals in *North Broward* were not challenging a Medicare regulation "but were merely attempting to raise with the PRRB claims that they inexplicably failed to raise with their intermediaries." 815 F.2d at 1457.

As a result of the *Adams House* and *Tallahassee* decisions, there is now a four-way rather than a three-way split among the circuits on the question whether the Board, and hence the court, has jurisdiction over self-disallowances. The Seventh and Ninth Circuits hold jurisdiction exists.

[1] A petition for a writ of certiorari was filed in the *Tallahassee* case on September 2, 1987, No. 87-380.

[2] Section 1395oo(f)(1) is reprinted at pages 4-5 of the Petition.

[3] A petition for a writ of certiorari was filed in the *North Broward* case on May 26, 1987, No. 86-1986.

The Fourth, Sixth and District of Columbia Circuits hold it does not exist. In the First Circuit, whether jurisdiction exists is up to the Board's discretion in each case. And now in the Eleventh Circuit, whether jurisdiction exists depends upon whether a hospital seeks to directly challenge a Medicare regulation. The petitioners respectfully submit that the issue is ripe for a definitive resolution by the Supreme Court.[4]

Respectfully submitted,

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[4] The listing required by Rule 28.1 was submitted in the petition for writ of certiorari filed on May 2, 1987.